

## The State of South Carolina



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July 24, 1989

Michael D. Jarrett, Commissioner  
South Carolina Department of Health  
and Environmental Control  
J. Marion Sims Bldg. And R. J. Aycock Bldg.  
2600 Bull Street  
Columbia, SC 29201

Dear Mr. Jarrett:

You have asked for an Opinion regarding the legal validity and enforceability of the guarantee and the surety bond set forth at 40 C.F.R. §280.96(c) and §280.98(b), respectively.

The Environmental Protection Agency has promulgated a final rule to implement financial responsibility requirements applicable to owners and operators of underground petroleum storage tanks. 53 F.R. 43322 (October 26, 1988). The rule allows owners and operators to use various mechanisms, including guarantees and/or surety bonds, to demonstrate financial responsibility for corrective action and third-party compensation as required by 40 C.F.R. 280.93. The rule further provides that the guarantee and surety bond described in the rule may be used only if the Attorney General of the state in which the tanks are located has submitted a written statement that the guarantee and surety bond create legally valid and enforceable obligations in that state, 40 C.F.R. §280.94(b).

Under South Carolina law, a guarantee is a "promise to answer for the payment of some debt or the performance of some duty in case of the failure of another person who is himself, in the first instance, liable to such payment or performance." McGee v. F.W. Poe Mfg. Co., 176 S.C. 288, 180 S.E. 48 (1935). Although South Carolina law requires notice of acceptance of the guarantee in some circumstances, the notice requirement is expressly waived in Paragraph 9 of the guarantee recitals. See Greene v. Simon Brown's Sons 128 S.C. 91, 121 S.E. 597 (1924); J.L. Mott Iron Works v. Clark, 87 S.C. 199, 69 S.E. 227 (1910). A guarantee may be either conditional or absolute, Georgian Co. v. Britton, 141 S.C. 136, 139 S.E. 217 (1927); the guarantee described in the rule is conditional. 40 C.F.R. 280.96(c)(3).

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Suretyship is the "lending of credit to aid a principal who has insufficient credit of his own, and is a direct contract to pay the principal's debt or perform his obligation in case of his default." Philco Finance Corp. v. Mehlman, 245 S.C. 139, 139 S.E.2d 476 (1964). Unlike a guarantee, which is secured by financial strength of the guarantor, a surety is secured by the posting of a bond. See 40 C.F.R. §§280.96(b) and 280.98(a). The surety's liability is not absolute, but is contingent upon an underlying obligation on the part of the principal to pay the debt or perform the obligation. Carolina Winds Owners' Assoc., Inc. v. Joe Harden Builder, Inc., \_\_\_ S.C. \_\_\_, 374 S.E.2d 897 (Ct. App. 1988).

We note that because of the short time frame involved in responding to this request, we have not been able to conduct exhaustive research. Nevertheless, we have reviewed the descriptions of the guarantee and surety bonds in 40 C.F.R. §§280.96(c) and 280.98(b), and a guarantee or surety bond executed as described in those provisions appears to be a valid and enforceable obligation in this state, as long as they conform to other general requirements regarding form, execution and consideration. Counsel for the Department of Health and Environmental Control has provided research as to this matter, and has reached these conclusions with which we concur. These conclusions are limited to the forms of the guarantees and surety bonds in §§280.96(c) and 280.98(b), and we express no opinion as to particular bonds or parties thereto.

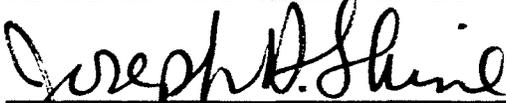
Yours very truly,

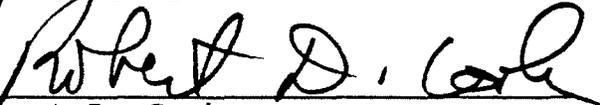
  
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JESjr/jps

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